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SUPREME COURT OF THE UNITED STATES

STANDARD OIL COMPANY (NEW JERSEY),
Petitioner,

AGAINST

SOUTHERN PACIFIC COMPANY and JAMES C. DAVIS, Director General of Railroads,
Respondents.

October Term,
1924
No. 197

BRIEF FOR RESPONDENTS

There are two questions involved in this appeal: (1) the value of a steamship sunk by collision, and (2) the effect of a settlement between the owner of the steamship and the Director General of Railroads on their rights against the other vessel.

STATEMENT

December 28, 1917, pursuant to the Act of Congress of August 26, 1916, and the proclamation of the President, the transportation system of the Southern Pacific Company, including the steamship *Proteus,* was taken into the possession and control of the Director General of Railroads.

August 19, 1918, during the period of Federal control, the *Proteus* was sunk by collision with the steamship

Cushing, owned by the Standard Oil Company (N. J.), and, with her cargo, became a total loss.

March 14, 1919, the petitioner, Standard Oil Company (N. J.), as owner of the *Cushing,* filed a petition for limitation of liability; and on July 21, 1919, the Southern Pacific Company, as owner of the *Proteus,* and Walker D. Hines, as Director General of Railroads, filed a petition for limitation of liability. These two proceedings were consolidated by order entered November 6, 1922 (Record, p. 196).

The District Court held both the *Cushing* and *Proteus* to blame and referred the question of damages to a commissioner.

There was little or no contest over the claims for personal injury or cargo damage, but the value of the *Proteus* was sharply contested. The commissioner reported her value as $750,000 (Commissioner's report, Record, pp. 180-191), and the report was confirmed by Mack, *C. J.* His opinion is at pages 192-6. A final decree was entered apportioning the damages, giving the owners of the cargo full recovery, and striking a balance in favor of the Southern Pacific Company and the Director General of Railroads of $200,448.89, "being one-half of the difference between the amount of their damages * * * interest * * * and costs, and the damages sustained by Standard Oil Company (N. J.) as owner of the *Cushing* with interest * * * and costs, including the amount paid by the Standard Oil Company (N. J.) to the cargo claimants" (Record, p. 216, fol. 898).

From the final decree both the Standard Oil Company and the Southern Pacific Company appealed, the Standard Oil Company on the merits only (Assignments of

error, Record, pp. 217-8); the Southern Pacific Company as to the value of the *Proteus* only, Record, pp. 218-9, fols. 904-6).

The Circuit Court of Appeals affirmed the decision on the merits, and fixed the value of the *Proteus* at $1,225,000, which, on the apportionment of damages, would increase the recovery of the Southern Pacific Company and the Director General of Railroads from $200,448.89 to about $500,000 (Opinion of Manton, *J.*, Record, pp. 222-230).

The petition for a writ of *certiorari* stated as reasons for allowance of the writ:

1. That the Circuit Court of Appeals based its finding on estimated cost of replacement less depreciation, which the petitioner charged was "an arbitrary formula based on two uncertain factors, to the exclusion of other material factors of controlling relevance."

2. That the measure of damages adopted by the Circuit Court of Appeals did not agree with that of other Circuit Courts of Appeal, and that it was therefore desirable that this Court should lay down a uniform and reasonable rule.

3. That the Standard Oil Company (N. J.) and the Director General were joint tort feasors who had caused the loss of the Southern Pacific Company's steamship *Proteus*, and that as the Southern Pacific Company and the Director General had made a settlement, any claim by the Southern Pacific Company against the Standard Oil Company (N. J.) was thereby extinguished, and that "in any event the Southern Pacific Company should not

be allowed to claim from the petitioner more than it has agreed with its demise charterer, the Railroad Administration, as the value of the *Proteus* and the basis for its damages for the loss of the *Proteus* through that charterer's fault" (Petition for *certiorari*, p. 6).

The allegations of subdivision 3 of the petition were *dehors* the record. Therefore, on April 28, 1924, the petitioner applied to this Court for leave to take additional evidence in this Court under an open commission. This Court denied the application for an open commission and directed that any new evidence should be pursuant to Rule 7 of the General Rules of this court.

Abstract of New Evidence

The new evidence, contained in a separate volume, proves little more than the execution of two written agreements:

(1) The agreement of February 19, 1919, which had already been introduced in evidence on the reference to assess damages (Commission, pp. 9-36; unnecessarily reprinted at pp. 68-95; see also Record, p. 107).

(2) The final settlement between the Director General and Southern Pacific Company and affiliated companies, dated December 19, 1922, under which the Director General paid the Southern Pacific Company $9,250,000 "in full satisfaction" of all claims "growing out of or connected with the possession, use, and operation of the companies' property by the United States during the period of Federal control", and the companies acknowledged that "the Director General had fully and com-

pletely complied with and satisfied all obligations on his part, or on the part of the United States, or the United States Railroad Administration, growing out of Federal control" (Commission, pp. 38-41; unnecessarily reprinted at pp. 96-9).

The agreement of February 19, 1919, establishes what was already perfectly clear, that the relations of the owner of the *Proteus* with the Government were purely contractual.

The petitioner took the depositions of four officials of the Southern Pacific Company, of the Director General of Railroads and three members of his staff. There were no cross-interrogatories.

Vandeventer, treasurer (Commission, p. 41), and Neill, secretary (p. 46), of the Southern Pacific Company knew nothing whatever of the matters as to which they were questioned. Mr. Kruttschnitt, Chairman of the Executive Committee of Southern Pacific Company, produced the contract between the Director General of Railroads and the Southern Pacific Company and affiliated companies dated February 19, 1919, which embodied the agreement between the companies and the Railroad Administration as to the taking over of the railroad system, including the *Proteus* and other vessels, the operation of the system during Federal control, its up-keep, taxes, compensation, claims and final accounting. This agreement had already been put in evidence on the reference to assess damages as Petitioner's Exhibit 1 (Record, p. 107). It was also produced on the examination of Mr. Davis, Director General of Railroads, and is unfortunately printed twice as part of the new proofs (Commission, pp. 9-36; pp. 68-95).

Mr. Kruttschnitt, when asked in the fifth interrogatory (p. 3, fol. 9) whether there were any negotiations had between the Director General of Railroads and the Southern Pacific Company in connection with a payment to the Southern Pacific Company for the loss of the *Proteus,* replied that he had no personal knowledge on which to answer the interrogatory; that up to the end of Federal control the interests of his company in connection with the loss of the *Proteus* were looked after by Mr. Spence, Director of Traffic, and Mr. Blair, General Counsel, and that after the end of Federal control the handling of claims was in charge of Mr. McDonald, Controller (p. 4) (None of these men was examined). In answer to the twenty-third interrogatory Mr. Kruttschnitt said that a lump sum settlement was made between the Director General and the companies for $9,250,000.

"I do not know what, if anything, was allowed in such lump sum settlement on account of the loss of the steamship *Proteus.* The lump sum was offered to us in settlement, and being the best offer we could obtain we accepted it. It was many million dollars less than the aggregate of the claims of the Southern Pacific Company and its subsidiaries. We do not know upon what principle our claim was scaled or eliminated" (p. 7, fol. 17).

In answer to the twenty-sixth interrogatory, as to any oral negotiations concerning the value of the *Proteus,* Mr. Kruttschnitt said:

"I know of no such negotiations, except that I am informed that a discussion took place between Mr. McDonald, Controller, and others representing the Southern Pacific, and Mr. Frank C. Wright, who represented the Director General, concerning claims of the Director General and of the Southern Pacific Company growing

out of the operation by the Director General of the steamship lines of the Southern Pacific Company. I am informed that in the course of these negotiations the value of the *Proteus* was discussed, that no final agreement was reached respecting the subject matter of the negotiations" (pp. 7-8, fol. 18).

Mr. Jungen, manager of the Southern Pacific Steamship Lines (p. 51), testified that in December, 1922, negotiations took place between Mr. Wright, representing the Director General, and Mr. Blair, the General Counsel, and members of Mr. McDonald's accounting force.

"I was also present and took part in the negotiations. The subject matter of the negotiations was all claims of either the Director General during Federal control, that is from January 1, 1918, to March 1, 1920. Among these claims was one for the value of the *Proteus*. The negotiations were oral and continued for some time. No final agreement was arrived at. I understood the object of the negotiations was to enable Mr. Wright to make a report to the Director General on this branch of the general claim of the Southern Pacific Company growing out of the operation of its transportation system by the Director General. What report, if any, was made by Mr. Wright I do not know" (p. 52, fol. 73).

Of the four witnesses from the Railroad Administration, Mr. Blaisdell, treasurer (p. 106), knew nothing of the matters as to which he was questioned.

Frank C. Wright, who was Assistant Director of Operations of the Railroad Administration in charge of marine matters (p. 56, fol. 83), testified that Mr. McDonald, controller of the Southern Pacific Company, discussed with him "their claim for the loss of the steamship *Proteus* and the lighter *Confidence*" (p. 57, fol. 85). In answer to the ninth interrogatory he said that no agreement was "reached as to the amount which should

be paid by the Railroad Administration to the Southern Pacific Company for the loss of the *Proteus*" (p. 58, fol. 86); and in answer to the fourteenth interrogatory he said that no "item representing the amount to be paid for the loss of the *Proteus* appeared in any schedule of items embodied in any general settlement between the Director General of Railroads and the Southern Pacific Company" (p. 58, fol. 87). Asked in the twenty-third interrogatory whether there was a lump sum settlement, what it was and what was allowed therein on account of the loss of the *Proteus*, he said that the lump sum was $9,250,000; "I cannot state what was allowed on account of the loss of the steamship *Proteus*" (pp. 59-60, fols. 90-1).

James C. Davis, appointed Director General of Railroads March 28, 1921 (p. 62, fol. 97), testified, in answer to the sixth interrogatory, that the final settlement with the Southern Pacific Company, which was the subject of investigation for several months prior to December 19, 1922,

"involved a claim on the part of the Southern Pacific Company, growing out of the use and operation of its property during the period of Federal control, which aggregated $54,252,694.57, and included in this claim was the claim for the loss of the steamship *Proteus*. * * * The negotiations leading to a final settlement covered a number of meetings and conferences from perhaps the 20th of November to the date of the final settlement, December 19, 1922" (pp. 62-3, fols. 97-8).

In answer to the ninth interrogatory he said that the steamship *Proteus* and the lighter *Confidence* having been sunk during Federal control, and claims having been made by the Southern Pacific Company for under-mainte-

nance of the floating equipment and property taken over by the Government, and claims having been made by the Government against the Southern Pacific Company for excess-maintenance, a conference was held about November 20, 1922, between Mr. Wright and Mr. McDonald and other representatives of the company.

"This conference was for the purpose of enabling Mr. Wright to recommend to the Director General and his Staff his view of a fair adjustment of the disputed items in the claim of the Southern Pacific Company covering the destruction of the Barge *Confidence,* the loss of the Steamship *Proteus,* and the disputed items of over and under maintenance. As a result of the conference, Mr. Wright recommended to the Director General and his Staff the following adjustment of the items above referred to:

"Allowance to the Company for undermaintenance of terminals, $20,000.00. Allowance to the Director General for excess maintenance of floating equipment, $235,000.00 This was a net allowance to the Railroad Administration of $215,000.00 excess maintenance.

"It was further recommended that the Railroad Administration allow the Company for the value of the Steamship *Proteus* and the Lighter *Confidence* a lump sum of $885,000.00. It is perhaps fair to state that the amount claimed for the loss of the Lighter *Confidence* was $16,664.00.

"As a result of these various credits, and debits, it was recommended by Mr. Wright that the Director General allow the Southern Pacific Company the sum of $670,000.00. This recommendation made by Mr. Wright was for the purpose of assisting the Director General and his staff in concluding a final adjustment of all the claims which the Southern Pacific Company was making against the Government for the use of its property during the period of Federal control" (pp. 63-4, fols. 100-1).

In answer to the fourteenth interrogatory he said that the settlement was a lump sum settlement and that he

made no itemized statement showing the amounts paid on each item in dispute. He added

"It is only fair to say, however, that in making each of these settlements the Railroad Administration kept a record, which was exclusively for the use of the Railroad Administration, and was not in anywise communicated to the carriers, showing how the lump sum settlement was finally arrived at, and in the records of the Railroad Administration there appear the items showing how this lump sum was arrived at in making the adjustment with the Southern Pacific Company.

"The Company claimed for the loss of the Steamship *Proteus* $1,268,090.26, and for the loss of the Barge *Confidence* $16,663.80, and, in arriving at the lump sum, the Railroad Administration made an allocation and apportionment on these two items of $885,000.00.

"It is perhaps only fair to state that this allocation and apportionment were made in connection with the adjustment of very many items in dispute, covering an aggregate claim in excess of $54,000,000.00, and no definite agreement as to specific items was made with the Company at the time of the final adjustment" (p. 65, fols. 103-4).

In answer to the twenty-fourth interrogatory he said that releases were exchanged between the Railroad Administration and the Southern Pacific Company (p. 67, fol. 108).

Leo J. Tracy, Controller of the Railroad Administration (p. 99, fol. 143), corroborated the testimony of Mr. Davis, the Director General, stating, in answer to the fourteenth interrogatory, that in making the settlements "the Railroad Administration kept a record, which was exclusively for the use of the Railroad Administration, and was not in anywise communicated to the carriers, showing how the lump sum settlement was finally arrived at. He says:

"The company claimed for the loss of the steamship *Proteus* $1,268,090.26 and for the loss of the barge *Con-*

fidence $16,663.80 and, in arriving at the lump sum, the Railroad Administration made an allocation and apportionment on these two items of $885,000.

"It is perhaps only fair to state that this allocation and apportionment was made in connection with the adjustment of very many items in dispute, covering an aggregate claim in excess of $54,000,000. and no definite agreement as to specific items was made with the company at the time of the final adjustment" (p. 103, fols. 150-1).

Procedure

At the outset, an orderly statement of the procedure followed is desirable:

1. The first admiralty proceeding in this litigation was a libel *in rem* filed by the Southern Pacific Company, owner of the *Proteus,* against the steamship *Cushing* September 11, 1918 (Record, fol. 9). This is not printed in the record, but is mentioned in the sixth article of the petition of the Standard Oil Company for limitation of liability (Record, p. 4, fol. 9). The damages claimed in this libel, $1,850,000, included not only the value of the *Proteus* but also personal effects of officers and crew and cargo of which the Southern Pacific Company was bailee.

2. March 14, 1919, the Standard Oil Company as owner of the *Cushing* filed a petition for limitation of liability.

3. July 21, 1919, the Southern Pacific Company, as owner of the *Proteus,* and Walker D. Hines, as Director General of Railroads, together filed their petition for limitation of liability (Record, fol. 33).

As the Director General was operating the *Proteus* under requisition, manning, victualling, and navigating the vessel, he was entitled to limit his liabilty to the same extent as a private charterer. *The Virginia,* 264 Fed. 986. It may have been unnecessary for the Southern Pacific Company to join in the petition, but as it had been sued in the New York Supreme Court and in the United States District Court by persons claiming damages for personal injuries (Record, p. 12, fol. 39) and as many claims had been presented to it (Record, p. 14, fol. 45), it was prudent and convenient for the Southern Pacific Company to join in the petition. Moreover, as appears from the record, the *Proteus* was insured against marine perils and the interests of the underwriters would be best protected by making the original assured, the Southern Pacific Company, a party to the proceeding (Record, fols. 792, 794, 795, 796 and 798).

4. The final decree of the District Court, entered November 28, 1922, adjudged that the "Southern Pacific Company and James C. Davis, as Director General of Railroads, as Agent, recover from the petitioner, Standard Oil Company (New Jersey), with interest until paid, the sum of $200,448.89." Settlement between the Director General and the Southern Pacific Company was not made until about a month later, December 19, 1922 (Final Settlement, Commission, pp. 38-41).

5. December 27, 1922, the Standard Oil Company appealed from the final decree (Notice of Appeal, Record, p. 217, fol. 899).

6. January 18, 1923, the Standard Oil Company filed its assignments of error, which disclosed the fact that

it appealed only on the merits and not on the question of damages (Assignments of Error, Record, pp. 217-8, fols. 901-3).

7. January 27, 1923, the Southern Pacific Company, as claimant, appealed from the final decree on the value of the *Proteus* only (Record, p. 218, fol. 904).

Thus both the merits and the damages were brought before the Circuit Court of Appeals. It was unnecessary for the Director General to join in the appeal. He had settled with the Southern Pacific Company and no doubt had been paid by the underwriters. The appeal was for the benefit of the underwriters, who might have intervened as co-claimants but were satisfied to allow the litigation to proceed in the name of the Southern Pacific Company.

Counsel for the petitioner in their brief criticize us for representing on the reference both the Government and the Southern Pacific Company, suggesting that because of a conflict of interest they should have been represented by separate counsel. That would, however, seem to be a matter for the Director General and the Southern Pacific Company to determine for themselves. It was purely a matter *inter sese.*

POINTS

I. THE SETTLEMENT MADE BETWEEN THE DIRECTOR GENERAL OF RAILROADS AND THE SOUTHERN PACIFIC COMPANY HAD NO EFFECT UPON THE RESPONDENTS' RIGHTS.

1. The substance of the petitioner's argument with respect to the additional testimony taken by commission is that in consequence of its settlement with the Railroad Administration the Southern Pacific is precluded from recovering on the decree. Inasmuch, however, as an appeal in admiralty is a trial *de novo,* the petitioner has sought to rearrange the parties in accordance with its own purposes, with a view to determining what allowance should be made to the Director General of Railroads as the real party in interest. In other words, the petitioner does not claim that the release by the Southern Pacific Company to the Director General releases it altogether. The contention is that it releases it only so far as the Southern Pacific Company is concerned. It is not claimed that its liability to the Director General is released, but, because its liability to the Southern Pacific Company is released, the sum of its liability to the Director General should be readjusted.

The petitioner devotes much space to a demonstration of the supposed necessity of a re-alignment of the parties in view of the settlement between the Director General and the Southern Pacific Company. The foundation of this pretentious discourse is the fallacious assumption that the Southern Pacific Company could have sued the Director General, either alone or together with the Standard Oil Company, in tort for the collision. No authority

is vouchsafed for this proposition, which, while of minor importance, may be answered briefly.

The Director General was not a tort feasor with respect to the Southern Pacific Company, first, because the relations between them were governed by contract, and, secondly, because if the Director General could be said to have committed a wrong against the Southern Pacific Company, it was not a legal wrong since he was immune from suit.

This Court said in *Dupont de Nemours & Co.* v. *Davis*, 264 U. S. 456:

"In taking over and operating the railroad systems of the country the United States did so in its sovereign capacity, as a war measure, 'under a right in the nature of eminent domain,' *North Carolina R. R. Co.* v. *Lee*, 260 U. S. 16; *Missouri Pacific R. R. Co.* v. *Ault*, 256 U. S. 554; *Northern Pacific Ry. Co.* v. *North Dakota*, 250 U. S. 135; *In re Tidewater Coal Exchange*, 280 Fed. 648, 649; and it may not be held to have waived any sovereign right or privilege unless plainly so provided." p462

The sovereign immunity from suit was waived only to the extent specified in Section 10 of the Federal Control Act:

"That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. * * * But no process, mesne or final, shall be levied against any property under such Federal control."

Construing this provision this Court said in *Missouri Pacific Railroad Co.* v. *Ault*, 256 U. S. 554:

"The plain purpose of the above provision was to preserve to the general public the rights and remedies against common carriers which it enjoyed at the time the railroads were taken over by the President except in so far as such rights or remedies might interfere with the needs of federal operation. The provision applies equally to cases where suits against the carrier companies were pending in the courts on December 28, 1917; to cases where the cause of action arose before that date and the suit against the company was filed after it; and to cases where both cause of action and suit had arisen or might arise during federal operation. The Government was to operate the carriers, but the usual immunity of the sovereign from legal liability was not to prevent the enforcement of liabilities ordinarily incident to the operation of carriers. The situation was analogous to that which would exist if there were a general receivership of each transportation system. Operation was to be continued as theretofore with the old personnel, subject to change by executive order. The courts were to go on entertaining suits and entering judgments under existing law, but the property in the hands of the President for war purposes was not to be disturbed. With that exception the substantial legal rights of persons having dealings with the carriers were not to be affected by the change of control."

The substance of the privilege conferred by Section 10 was, therefore, that "carriers while under Federal control shall be subject to all laws and liabilities as common carriers". Only as a common carrier could the Director General be sued in tort. It must be apparent that the Director General was not a common carrier with respect to its possession and control of the *Proteus*, and that the Southern Pacific Company could not sue him in tort for her loss by collision. Such an action would not be "the

enforcement of liabilities ordinarily incident to the operation of carriers".

Since the Director General could not be sued, he cannot be said to have committed a tort. As this Court said in *The Western Maid*, 257 U. S. 419, 433:

"The United States has not consented to be sued for torts, and, therefore, it cannot be said, in a legal sense, that the United States has been guilty of a tort, for a tort is a tort in the legal sense only when the law has made it so."

The sole remedy of the Southern Pacific Company was under its contract of February 19, 1919, made pursuant to the provisions of the Act of March 21, 1918, and the President's proclamation of March 29, 1918.

2. The petitioner next contends that as the Director General did not appeal from the decree of the District Court, he cannot be allowed a higher value for the *Proteus* than that fixed by the District Court, or, at all events, no higher value than the amount he paid to the Southern Pacific Company in settlement of his contract obligation.

It must be observed that this point was not suggested in the Circuit Court of Appeals, where the valuation of the *Proteus* was increased. It is well settled, as the petitioner admits, that an appeal in admiralty is a trial *de novo*. *Irvine* vs. *Hesper*, 122 U. S. 256; *Reid* vs. *Fargo*, 241 U. S. 544; *Watts, Watts & Co.* vs. *Unione Austriaca, etc.*, 248 U. S. 9; *The John Twohy*, 255 U. S. 77. Accordingly, in *Irvine* vs. *Hesper, supra*, where on an appeal by salvors alone from a decree of the Circuit Court reducing the award made by the District Court, this Court said:

"We do not think that the fact that the claimants did not appeal from the District Court alters the rule. When

the libellants appealed, they did so in view of the rule, and took the risk of the result of a trial of the case *de novo*. The whole case was opened by their appeal, as much as it would have been if both parties had appealed, or if the appeal had been taken only by the claimants." p 267

In *Munson Steamship Line* vs. *Miramar Steamship Company*, 167 Fed. 960, which was approved by this court in *Reid* vs. *Fargo, supra*, the Circuit Court of Appeals for the Second Circuit increased an award of the District Court although the libellant had not appealed, rejecting the contention that one who had not appealed could be heard only in support of the decree and could not have more or other relief than it gave.

"The libellants were justified in regarding the appeal taken by the claimants as securing to libellants the right to be heard in the Appellate Court without the necessity of perfecting a cross-appeal in order to preserve that right." *The John Twohy, supra.*

It is, therefore, idle to contend that the Director General of Railroads was finally bound by the valuation fixed by the District Court because he did not join in the appeal.

Nor is there greater force in the petitioner's suggestion that the Director General must be limited to a valuation equivalent to the amount paid to the Southern Pacific Company in settlement of his contract obligation. This contention is involved with the petitioner's confused ideas concerning the common law doctrine of joint tort feasors, which are examined later. But it may be observed here that although the petitioner repeatedly refers to the amount of this payment the sum is not mentioned. No amount was in fact agreed upon. The aggregate claim of the Southern Pacific Company was $54,252,694.57. The

lump sum settlement which it perforce accepted (Commission, p. 7) was $9,250,000 (Commission, p. 64). There was no agreement as to specific items in the final adjustment. The Railroad Administration kept its own record showing how the lump sum was finally reached, but this was not communicated to the Southern Pacific Company (Commission, p. 65). The Director General says that Mr. Wright recommended to him to allow the company for the *Proteus* and the lighter *Confidence* $885,000, of which $16,664 was for the lighter, but that making an allowance to the company for under maintenance of terminals, $20,000, and charging it with $235,000 for excess maintenance of floating equipment reduced the allowance to $670,000 (Commission, p. 64).

The petitioner's reference to the case of *The Jersey City*, 51 Fed. 527, as authority for its view (Brief, pp. 53, 54) is singularly inept. There, the owner of a tug whose tow had been damaged by collision with a ferryboat, paid under protest the demand of the owner of the tow, taking in return a release from all liability which in terms subrogated him to right of the owner of the tow. The tug owner then libelled the ferryboat, alleging these facts and basing his claim on subrogation. The petitioner stresses the fact that the tug owner recovered "the amount which it had paid to the owner of its tow in settlement of the damages received by the latter". The reason was that this was the only amount for which he sued. But the Circuit Court of Appeals added that as bailee he was entitled, without reference to subrogation, to recover full damages:

"If, say the court in *White* vs. *Webb*, 'the suit is brought by a bailee or special property man against the

general owner, then the plaintiff can recover the value of his special property; but if the writ is against a stranger, then he recovers the value of the property and interest according to the general rule, and holds the balance beyond his own interest, in trust for the general owner. The libellant could have recovered the damages occasioned by the tort of the ferryboat, without paying the owner of the tow. A subsequent payment, whether *ex gratia* or under compusion, could not prejudice the right of recovery."

3. The settlement made by the Southern Pacific Company with the Railroad Administration had no legal effect upon the decree below.

The Director General was the special owner in sole possession and control of the *Proteus,* and the Southern Pacific Company was the owner of the reversion. Together they constituted a single owner and together they held the full interest in the claim of the *Proteus* against the *Cushing.* This common claim was reduced to a decree against the *Cushing* in favor of both the Director General and the Southern Pacific Company.

It is, of course, obvious that upon the satisfaction of such a common decree there would have to be an adjustment of the equities between the parties as their interests might appear. No reason is apparent why these equities should not be settled during the litigation as well as after its close. As against a third party the common right and common decree should persist.

There was no tort by the Director General toward the Southern Pacific Company upon which a release could operate. The rights and duties of the Southern Pacific Company and the Railroad Administration were fixed by the contract of February 19, 1919. By its terms the *Proteus* was required to be either

restored or paid for. Since she was not restored she was paid for in accordance with the agreement. The Southern Pacific Company as owner was not concerned in the least with the circumstances which made it impossible for the Director General to restore her. Nor was its right to reimbursement affected by any considerations of liability for her loss. If lost without negligence, the Railroad Administration, although not liable as bailee, was liable under its contract. *Clarke* v. *United States,* 95 U. S. 539, 542. The obligations of the Director General to the Southern Pacific Company on the one hand, and to the *Cushing* on the other, were separate and distinct, resting in the former case on contract, in the latter in tort.

The principle which the petitioner has lost sight of is illustrated by a line of cases of which *Ridgeway* vs. *Sayre Electric Co.,* 258 Pa. St. 400, may be cited as an example. There an employee of an electric company was killed by coming in contact with the wires of his company while repairing those of a telephone company using the same poles. He had been under an insurance plan with his employer, and his wife, upon receiving payment of the amount of the insurance, gave his employer a release, which the telephone company set up in defense to a suit against it. In refusing to apply it to that effect the Court said:

"The payment of the policy in such a case is not in settlement of the claim for damages or as the value of the injury, but is on the basis of a contract and in consideration of the receipt of the premiums. The payment here was the exact amount of the insurance fund as stated above and was made without reference to, or in anywise concerning, an alleged tort; nor is there evidence tending

to show the parties dealt otherwise than on a contractual basis, without reference to questions of negligence or responsibility for the action. It cannot be said, therefore, that the plaintiff has obtained satisfaction of her claim for damages from one tort feasor and hence the release of the other does not exist."

In admiralty, where both vessels are found in fault for collision, the resulting division of damages extends of course to what one of the parties pays to the owner of cargo on board the other, with respect to which, however, the contract relations of the vessel and her cargo have nothing to do. *Erie R. R. Co.* vs. *Erie & Western Transportation Co.*, 204 U. S. 220, 226; *The Chattahoochee*, 173 U. S. 540. Nor does a seaman's contract with the owners of his vessel affect his representative's claim against the other vessel where both vessels were in fault for his death. *The Hamilton*, 207 U. S. 398.

The satisfaction by the Railroad Administration of its contractual obligation to the Southern Pacific Company had no more effect upon the tort obligations of the Standard Oil Company than would have been the case if the Railroad Administration had paid the purchase price of the *Proteus*, or had collected from underwriters. *The Atlas*, 93 U. S. 302, 310.

4. The two vessels in collision were not, however, joint tort feasors within the common law rule. The precise point was decided by the English Court of Appeal last year in the case of *The Koursk* [1924], P. 140; 40 T. L. R. 399. It is a curious fact, as one of the judges remarked, that although abundant dicta could be found, the question, what constitutes a joint tort feasor within the meaning of the rule, had never been closely considered in any reported English case. After a careful consideration

of the question the Court of Appeal came to the conclusion, as the court below had, that the test whether damage which flows from the negligent navigation of two ships constitutes a joint tort, is whether the wrongdoing ships were participating in one act of negligence or whether they were by separate acts of negligence combining to produce the same damage. Or, conversely, parties are not jointly liable for a tort where each is responsible for a different *injuria*, and the two *injuriæ* happen to produce the same *damnum*. Lord Justice Scrutton said:

"The substantial question in the present case is what is meant by 'joint tortfeasors'? And one way of answering it is: 'Is the cause of action against them the same?' Certain classes of persons seem clearly to be 'joint tortfeasors': the agent who commits a tort within the scope of his employment for his principal and the principal; the servant who commits a tort in the course of his employment and his master; two persons who agree in common action, in the course of which, and to further which, one of them commits a tort. These seem clearly joint tortfeasors; there is one tort committed by one of them on behalf of, or in concert with, another. * * * But the same damage does not mean the same tort, and therefore does not mean the same cause of action. * * * To make the tort you want a wrongful act causing damage; and to make the tort the same cause of action both elements must be the same. Thus in *Brunsden* v. *Humphrey* (14 Q. B. D. 141), where the negligence was the same, but one damage was to the person and one to the property, a judgment for one cause of action, wrongful injury to property, was no bar to a second cause of action, trespass to the person. If this is so where the same negligence causes different kinds of damage, still more is it so where different and independent wrongful acts cause the same damage; there are two causes of action, and a judgment on one does not bar the other.

The judgment below in effect takes the same view as to the meaning of 'joint tortfeasors'. In the present case the *Koursk* was guilty of negligence in proceeding out of

course across the line of its convoy; the *Clan Chisholm* was guilty of quite independent negligence in not reversing when the action of the *Koursk* was observed. These two separate and independent negligences resulted in a collision, the direct consequence of which was a collision with the *Itria*. In my view the *Koursk* and the *Clan Chisholm* were not joint tortfeasors of the same tort, but separate tortfeasors of two different torts, and therefore at common law judgment against one in respect of the cause of action against it would not be an answer to a claim against the other in respect of the different cause of action on which it was sued."

"The *damnum* no doubt is only one", said Lord Justice Bankes, "and the act of negligence of each contributed to that *damnum*, but the acts of negligence are still, in my opinion, separate. There is no possible connection between them. They began, and they continued, and they ended, as separate acts, and they never became a joint act."

The sole difference between English law and our own in this respect is that our courts do not recognize the bar of a judgment without satisfaction. The most eminent judges here, as in England, have often used the term joint tort feasors as a short form of expression for defendants whose concurrent acts of negligence have caused an injury, where the judgment would have been the same if the word joint had been omitted. In the cases of concurrent negligence cited on page 45 of the petitioner's brief the defendants were sued together, and each was undoubtedly liable for the whole damage. The negligence of each tort feasor was a proximate cause of the injury, and it was impossible at common law to ascertain the degree in which each contributed to the result. But the fact that each tort feasor is liable for the entire damage does not warrant the conclusion that the tort is joint.

Co-defendants are not necessarily joint defendants. As Lord Justice Scrutton said in *The Koursk, supra:*

"This seems directed rather to the remedy for the tort than to the nature of the tort itself, and to say that a joint tort is one for which persons are jointly liable only leads to the inqury: For what torts are persons jointly liable?"

In the case at bar separate and different faults on the part of the two vessels brought about the collision. The *Cushing* was held in fault for not flashing on her lights and for failing to give the *Proteus* a wider berth; the *Proteus* for not signaling her extreme helm movement and for continuing at full speed. Each was liable, but they were not joint tort feasors.

also The Hudson (A. Brown J.) 15 Fed. 162-1

5. The truth is that the common law doctrine of joint tort feasors is wholly inapplicable to this situation. The reason why two tort feasors are each liable at common law for the entire damage caused by both, is that it is impossible in that forum to apportion the loss in accordance with their respective faults. But in admiralty there is no difficulty of this sort. Where both are in fault, the damages are apportioned one-half to each.

In this case, as the petitioner says (Brief, p. 50), the pleadings were "locked together, in effect, just as if they consisted of a libel and cross-libel". Before the settlement between the Railroad Administration and the Southern Pacific Company both vessels had been adjudged in fault and entitled to limit liability. Each vessel was condemned to pay one-half the damages arising from the collision. Inasmuch, however, as the *Proteus* was lost, the decree ran against the *Cushing*, the *Proteus* recovering only one-half her damage in con-

sequence of her fault. In this situation the relation of the parties was wholly unlike the status of joint tort feasors at common law. Since each was liable for one-half the damages, certainly neither was liable for the whole. Therefore, under common law analogies, the release of one would not release the other.

The inapplicability of the common law doctrine may be put in another way. A fundamental incident of the common law doctrine is the denial of contribution between the wrongdoers. The admiralty rule is well known, however, to be the other way. *Erie Railroad Co.* vs. *Erie Transportation Co.*, 204 U. S. 220, 225. *The North Star*, 106 U. S. 17; *The Sterling and The Equator*, 106 U. S. 647. The right to contribution belongs to the substantive law of admiralty and is not a mere incident of a form of procedure. *The Ira M. Hedges*, 218 U. S. 264. If, then, one of two vessels at fault may enforce contribution from the other, it cannot be said that each is liable for the entire damage as at common law. Even where one is sued alone, he is only primarily liable, since the other may be compelled to contribute. Undoubtedly, where an innocent third party claims against two vessels in fault, he is not limited to recourse to each for one half of the damage. If he cannot collect from each his due share, he may have his remedy over against the other for it. *The Alabama* and *The Gamecock*, 92 U. S. 695. But there is no such recourse in the case of cross-libels between two vessels in collision. *The Atlas*, 93 U. S. 302. When the fault of both is determined, the damages are apportioned one half to each. The liability is then in no sense joint, since each is liable only for a fixed portion.

II. THE CIRCUIT COURT OF APPEALS CORRECTLY STATED AND APPLIED THE RULE OF DAMAGES.

In his opinion Manton, *C. J.*, stated the rule thus:

"The principle governing the computation of damages is that the sufferer by the collision which is the result of wrongdoing, whether by negligence or mistake, is entitled to *restitutio in integrum*. It is that, as far as practicable, the owner is to be restored to the same pecuniary position as if no collision had taken place * * *" (Opinion, Record, pp. 227-8).

The application of this basic principle is supported by abundant authority. *The Baltimore* (8 Wall. 377); *Alaska S. S. Co.* v. *Inland Navigation Co.* (211 Fed. 842); *The I. C. White* (295 Fed. 593); *The Clyde* (Swabey 23); *The Clarence*, 1850 (3 W. Rob., 283, 285); Marsden's Collisions at Sea (7th Edition, 1919), p. 117; Roscoe on Damages (2nd edition, 1920), p. 5; Spencer on Maritime Collisions, § 200. It has been adopted by this Court as the rule of damages in eminent domain cases. *Campbell* v. *U. S.* (unreported), decided Dec. 8, 1924; *Seaboard Air Line Railway Co.* v. *U. S.* (261 U. S. 299).

The object of the rule is to place the owner of the vessel as nearly as may be in the same pecuniary position in which he would have been but for the collision, that is, the owner is entitled to recover the actual value of the lost vessel. The best evidence of such value is the opinion of competent persons who knew the vessel shortly before she was lost, and the next best evidence is the opinion of persons conversant with shipping and the transfer of vessels. If there is a market, these opinions are based upon current market prices. *The Baltimore* (*supra*); *The Colorado* (Fed. Cas. 3029); *Alaska S. S. Co.* v. *Inland*

Navigation Co. (*supra*); *The Mobila* (147 Fed. 882). Where no market exists, the basis of calculation is necessarily different. In some cases, where the vessel has been recently built, evidence of original cost with proper deduction for deterioration from the time of construction is given great weight. *Leonard* v. *Whitwill* (19 Fed. 54); *The City of Alexandria* (40 Fed. 697); *The Samson* (217 Fed. 344). Spencer on Maritime Collisions, § 200. Where the vessel has not been recently built or where for some other reason it would be inequitable to base the calculation on original cost, evidence of cost of reproduction less depreciation has been admitted and given important consideration. *The I. C. White* (*supra*); *In re Arbitration between the Mersey Docks and Harbor Board and the Lords Commissioners of the Admiralty,* 3 K. B. Div. [1920] p. 223.

Judicial discussion of these different kinds of evidence has led the Courts to state three rules of damages—market value, cost of production less depreciation, and cost of reproduction less depreciation—as the most trustworthy methods of measuring actual value, under the general principle of *restitutio in integrum.* The adoption of any one of these rules or methods does not involve the exclusion of all or any other relevant facts. Indeed, the question of value could not be determined without other evidence, such as the age of the vessel, her condition at the time of the collision, her size, tonnage, etc.

The petitioner's principal attack is directed against the statement of Manton, *C. J.,* that the special circumstances of the case "invoke the rule of damages of cost of (re)production less depreciation" (Record, p. 229).

The force of this attack is much weakened by the fact that all the petitioner's own expert witnesses based their valuations of the *Proteus* on cost of reproduction less depreciation. The method used by all the experts on both sides was the same. The only reason why the results differed was that one side assumed a lower cost of reproduction and a higher rate of depreciation than the other. Which set was correct was a pure question of fact. As the experts on both sides used only this method, it is not surprising that the learned Circuit Judge featured it in his opinion.

The finding of the Circuit Court of Appeals was not based on any one formula or theory, but on a consideration of all relevant facts and its conclusion that the weight of evidence was in favor of the higher valuation. This is evident from the closing sentences of their opinion:

"We think the greater weight of persuasive testimony favors the proof offered on behalf of the *Proteus* as to value, and that the rate of depreciation was fair and reasonable under all the circumstances * * *. We are convinced that the valuation fixed by the court below was inadequate, and that convincing testimony requires our accepting the value claimed by the owners of the *Proteus*" (Record, p. 230).

It is obvious that when read as a whole the opinion does not rest on a formula dogmatically stated and rigidly applied, but on all the evidence before the Court, which included all relevant facts. These facts Judge Manton considered and gave full weight to, for immediately after the statement criticised he referred to the age of the *Proteus*, her size and carrying capacity; her original cost, the fact that she was under requisition, the fact that she was reboilered in 1909, the fact

that she was unusually well kept up, and the fact that in 1917 "a joint Army and Navy Board and a Board of Appraisal of Merchant Private Vessels fixed the value of the *S. S. Saratoga* and the *S. S. Havana* at two and a half times what they cost in 1916" (Record, pp. 229-230, fols. 929-930).

III. The Circuit Court of Appeals rightly increased the value of the Proteus to $1,225,000.

The value of the *Proteus* at the date of her sinking is merely a question of fact. The Commissioner appointed by the District Court considered the three experts on each side as "equally frank and honest in giving their views", referred to the fact that the two groups were over $600,000 apart, and then concluded that "the views of the petitioner's witnesses seem to me more nearly in accord with the probabilities in the case at bar than those of claimant's witnesses" (Record, p. 190, fol. 847). He did not feel "called upon to find an exact replacement value or a particular method of depreciation that would disclose the exact amount that should be deducted for wear and tear during the period of 18 years." Quoting Judge Addison Brown in *The Utopia*, 16 Fed. 507, where he said:

> "I do not consider it imperative to adopt the judgment of any one of the witnesses, or any two or more, but, weighing the whole testimony, in all its parts, I feel justified in reaching a conclusion which a jury would entertain after hearing all the facts and circumstances."

the Commissioner fixed the value of the *Proteus* at $750,000 (Record, pp. 190-1, fols. 848-9).

In the District Court, Mack, *C. J.*, after stating that "the market for all such ships was for all substantial purposes closed during the war", and that "ships which happened to be free from requisition * * * were able to make huge monopoly profits from a single voyage", and that "so called market value of ships soared even out of proportion to the cost of construction of new ships, although this too had also increased abnormally" (Record, fols. 854-5), continued:

"If evidence is adduced, indicating that the market price is not fair under the circumstances, then all other relevant facts should likewise be considered in determining fair value" (fol. 856).

"The cost of reproduction less depreciation has been commonly adopted as a standard for rate making purposes. * * * But there are difficulties of theory and practice in the application of the standard. * * * Recently there has been a tendency among legal and economic writers to bring to the fore the prudent investment standard" (fols. 856-7).

He thought that it would be "proper in finding the fair value of the *Proteus* in August, 1918, to discount the then cost of reproduction" (fol. 858), and was inclined to reduce the value of the *Proteus,* but in view of the proof of the upkeep of the vessel, he concluded to confirm the report (fol. 862).

In the Circuit Court of Appeals Manton, *J.,* after stating the general principles of law governing in cases of total loss, commented on the evidence of cost of reproduction as follows:

"Evidence was offered on the trial in fixing the value in August, 1919, the date of the loss, of the cost of reproduction, less depreciation. The court below discounted

the cost of reproduction for the reason that it regarded the high prices of 1918 as artificial and fictitious, but the high prices represent actual values. The withdrawal by the belligerents of a large part of their merchant tonnage for commercial pursuits, for war and other public uses, the chartering of neutral ships to them for like purposes, and the heavy toll of merchant ships destroyed by the submarines and other hostile attacks, and commandeering the shipyards for the construction of ships for Government purposes, all caused not only a severe shortage of tonnage available for commercial uses, but disrupted the channels of the trade and caused high prices. It resulted in high freight rates and increased tonnage values. This condition was brought about by the war, and to be sure was not expected to survive indefinitely after the war, but there was nothing artificial or fictitious about these prices. They were brought about by unusual economic conditions. The period of high prices lasted for several years during the war period. Evidence was offered by the claimant that in 1917, a Joint Army and Navy Board, and a Board of Appraisal of Merchant Private Vessels, fixed the value of the S. S. *Saratoga* and the S. S. *Havana* at two and a half times what they cost in 1916. And in arriving at that conclusion, they estimated the cost of reproduction less depreciation" (Record, p. 229).

He then referred to other evidence in the case and found the following relevant facts:

"The *Proteus* was a steel passenger and freight steamship, equipped with triple expansion engines and Scotch boilers. Her speed was 15 knots, dimensions, 405 feet long, 48 feet beam, 32 feet 9 inches in depth. Her tonnage was 3,006 tons net; 4,836 tons gross and about 4,000 tons dead weight. She was built in 1900 by the Newport News Shipbuilding Company for use in the Southern Pacific Railroad Company's service between New York and New Orleans, and was so used until taken over by the Government. Her original cost was $557,600. In 1909 she was reboilered and otherwise improved at a cost of $90,000. She was unusually well kept as the court below found" (Record, p. 230).

Referring to the expert witnesses he said:

"Three experts, one a surveyor and appraiser of thirty-five years' experience, and the other two the presidents of two of the largest steamship companies in the United States, gave values for the vessel for August, 1918, which, justified the claim of $1,225,000. This made due allowance of two and a half per cent per year for depreciation. There is no fixed rule as to the amount of depreciation to be deducted, but two and a half per cent is reasonable in application for a period when there was such demand for vessels. Obviously, it might be unreasonable in other periods" (Record, p. 230).

* * * * * * *

"Opposed to this testimony is that of an employee of the owner of the *Cushing*, connected with the construction department. Another, who was a member of the Board that appraised the *Havana* and *Saratoga* at two and a half times its value at the time of construction. The third expert who seems to have had nothing to do with the valuation of merchant ships but who was engaged in the construction of yachts and torpedo boats" (Record, p. 230).

As "the greater weight of persuasive testimony" favored the proof of value offered in behalf of the respondents, the Circuit Court of Appeals concluded by finding the value of the *Proteus* to be $1,225,000.

1. Summary of evidence of value.

Respondents' Proofs.

The experts examined for the *Proteus* were Frank S. Martin, Alfred Gilbert Smith and H. H. Raymond.

Mr. Martin, a marine surveyor and appraiser of 35 years' experience, in 1918 alone appraised some 150 to 200 vessels as a member of the Ocean Advisory Board on Just Compensation (Record, p. 27, fol. 529). He had

known the *Proteus* since she was built and had seen her a few months before her loss (Record, p. 28, fol. 530). He valued her in August, 1918, at $1,225,000.

"Q. Mr. Martin, how do you get at this value of $1,225,000? What does it represent? A. There being no sales to guide me, I took the estimated cost of the reproducing a vessel of the same size and description as the *Proteus* in August, 1918; and the estimated cost was $1,750,000. From that cost I deducted two and one half per cent for eighteen years depreciation, which is $525,000, leaving a value of $1,225,000." (Record, p. 31, fol. 537).

Mr. Martin's opinion was based also on actual sales which occurred after the Armistice and he said the high values continued up to the beginning of 1920.

"Q. Mr. Martin, how long after the armistice did the high values continue and the high cost of construction? A. Up to about the first of this year. Since freight rates have fallen values have fallen.

"Q. And looking over the whole period tell us where the peak was? A. The peak of the values was just about shortly—just about the time of the ending of the war.

"Q. And am I to understand that after the armistice and for a year and a half after boats were sold for these high prices? A. They were, and up to the beginning of this year.

"Q. And the cost of construction kept very high you say? A. It did" (Record, pp. 32-3, fol. 540).

"Q. Is your valuation based on theory or is it based on experience in actual sales after the armistice? A. It is based on sales—based mostly on sales since the armistice, and also before the war, even before we went into the war vessels were selling for $300 a ton" (Record, p. 33, fol. 541).

* * * * * * *

"Q. And after the armistice the embargo so to speak was lifted? A. Yes.

"Q. And then they began to be sold again? A. Yes, that is correct.

"Q. At these very high prices? A. Yes, that is correct.

"Q. And it is on the consideration of those facts that you have fixed this sum of $1,225,000, as your best judgment of what the boat was worth and could have been sold for if it could have been sold on August 19, 1918, is that it? A. That is absolutely correct" (Record, pp. 33-4, fol. 541).

Mr. Raymond, President of the Clyde and Mallory Lines and of the American Steamship Association, who has been in the steamship business over thirty years, valued the *Proteus* at the time of her loss at $1,297,637. He took the replacement value, $1,750,000, allowed for depreciation and gave credit for "a little better than the ordinary depreciation because they kept their ships up better" (Record, pp. 57-63, fols. 586-597).

Mr. Smith, President of the New York and Cuba Mail Steamship Company, which operates 110 vessels, valued the *Proteus* at $1,350,000. Mr. Smith testified in part as follows:

"Q. And you know, I suppose, and keep yourself advised as to values of vessels and sales of vessels, do you not? A. Principally on costs of construction.

"Q. Many of your ships have been built under your direction have they not? A. Under my personal direction, yes, sir" (Record, p. 36, fol. 546).

* * * * * * *

"A. In arriving at a fair market value for the *Proteus* I proceeded on two separate different lines. In the early part of 1917 we had the steamship *Havana* and her sister ship the steamship *Saratoga* taken over by the Government. The Navy Department took the vessels and at that time the question of what compensation we would receive for the vessels came up. A board had been appointed by the Navy Department consisting of naval officers, naval constructors and engineers, as well as some commercial men—one prominent ship owner, and the Presi-

dent of the American Bureau of Shipping qualified as an engineer and builder.

"Q. That was Stevenson Taylor? A. Yes, Stevenson Taylor, and those gentlemen after listening to my testimony, etc., appraised the vessel and paid us $2,240,000 for each one of those vessels, one built in 1906 and the other built a few months after.

"Q. What tonnage. A. 6400.

"Q. Gross? A. Registered gross tonnage, approximately 5000 tons deadweight, passenger carrying capacity about 300.

"Q. Would that be divided into tons, any kind of tons, the value as so much per ton, Mr. Smith? A. In dealing with passenger boats we always give the gross registered tonnage. As I said before in dealing with freight vessels we always are accustomed to deal with what the vessels will carry in weight.

"Q. That value would be over $350 a ton? A. Yes, I think it figures about $350.

"Q. Gross tons? A. Yes.

"Q. Have you had other experiences that would lead you toward ascertaining the value of the *Proteus?* A. At that time, seeking to get at a price for the ships that were taken right out of our service, we asked the builders what they would duplicate the *Havana* and the *Saratoga* for.

"Q. Those were the Cramps? A. The Cramps. They had the plans and specifications, they knew what the vessels had cost to build and they were the logical people to give us a fair estimate, and their estimate was a little over $3,000,000 for each vessel.

"Q. That would be $500 a gross ton practically? A. I think exactly, in getting at this value, and as I said before I proceeded along two different lines. I said if the *Havana* had originally cost us $900,000——

"Q. (Interrupting.) That is what it cost you in 1906? A. Yes,—in 1906, and it was worth according to the Board of Appraisal, after considerable testimony had been given $2,240,000, then the *Proteus* which I calculated had cost in the vicinity of $600,000 originally, must be worth $1,500,000, less an allowance for the difference in the ages.

"Q. It was six years older? A. Yes, six years older, and I made an allowance of $150,000 and I arrived at a figure of $1,350,000 as the fair market value of that ship.

"Q. Did you approach the problem from any other angle? A. I approached it from another angle, and that was by taking the value of the *Proteus* to be say two-thirds of the value of the *Havana,* considering the vessel's tonnage, passenger capacity, speed, equipment and all that as being two-thirds of the *Havana*——

"The Commissioner: You think it was in fact about two-thirds?

"The Witness: To the best of my recollection; these are all approximate figures of course, Mr. Commissioner, I said if it will cost $3,000,000 to build the *Havana* it will cost $2,000,000 to build the *Proteus,* then allowing a depreciation for her age of six hundred and odd thousand dollars, brought it very close to the figures that I had obtained by the first process of $1,350,000, and it is on that that I gave the fair value of the ship at $1,350,000" (Record pp. 38-40, fols. 550-3).

Mr. Smith's method is different from that of other witnesses, although he arrives at substantially the same result. He considered the cost of reproduction and was able to check up his estimate by the amounts actually paid his company by the Government for two of his own steamers, the *Havana* and *Saratoga.* For the *Havana,* which was built in 1906, at a cost of $900,000, the Government paid $2,240,000 (Record, pp. 38-40, fols. 550-553).

Petitioner's Proofs

Petitioner's witness, Mr. Morrell, who had been employed in the Construction Department of the Standard Oil Company since 1914, knew nothing of values of vessels other than tankers. He admitted that he was not familiar in detail with the cost of construction of freight and passenger vessels.

"Q. And do you try to keep familiar with the sales of other vessels outside, not tankers? A. In a general way, but not in detail.

"Q. You are not at all interested in those freight and passenger boats, are you? A. Only in a general way.

"Q. You are not at all interested in the cost of constructing freight and passenger vessels, are you? You have not been since you have been with the Standard Oil Company during the last six years? A. Not in any detail" (Record, p. 76, fol. 621).

In arriving at a valuation of $630,000 Mr. Morrell started with $1,670,000 as the cost of reproduction, and then used a depreciation rate of 4% for 14 years, and 2½% for 4 years. He had little knowledge on the subject of depreciation and the high rate used by him was without foundation.

"Q. Have you a familiarity with the methods adopted by steamship companies in this country as to writing off the value of ships? A. Yes, sir.

"Q. What companies do you know of besides the Standard Oil Company? A. Why, the Shipping Board. I know the method they have used.

"Q. We all know that, but it is not a model, is it? A. I am not here to criticise the Shipping Board.

"Q What steamship company do you know, or are you familiar with or have enough familiarity with to say what it marks off each year on its books to represent the depreciation in value of a ship? What particular company do you know? A. I cannot name any company in which I am specifically informed as to their bookkeeping methods, but I do know the general method by which the depreciation is written off in a general way.

"Q. I am not asking you about anything in general, I am asking you something specific. Do you or do you not know any steamship company in this country well enough to say what it writes off each year to represent the depreciation in value of its ships? A. Not as to individual companies, no.

"Q. And what is this general knowledge that you assume? What is this general principle that you assume, what is it based on, what is it? A. Part of it is based on the testimony in this case. Mr. Martin, for instance, has taken five per cent. Mr. Raymond has taken three and one-half to four and one-half per cent" (Record, pp. 79-80, fols. 626-7).

Mr. Martin and Mr. Raymond both used 2½% (Record, pp. 31 and 63, fols. 537 and 598).

Mr. Gilmor had nothing whatever to do with the valuation of merchant vessels until he was made a member of the Joint Army and Navy Board and the Board of Appraisal of Merchant and Private Vessels (Record, p. 82, fol. 633). In 1917 the Board valued the *Havana* and *Saratoga* at $2,240,000 each, which is two and one-half times what they cost in 1906. Mr. Gilmor says this is perfectly consistent with his valuation of the *Proteus* (Record, fol. 665). But it is not. $2,240,000 for the *Havana* and *Saratoga* amounts to $448 per d. w. ton. By the same standard the *Proteus* should be valued at $1,724,000. Yet Gilmor values the *Proteus* at $650,000 or $168 per d. w. ton. The estimated cost of reproducing the *Havana* and *Saratoga* was $3,000,000 (Smith, fol. 553). If we apply the high rate of depreciation urged by petitioner, 5%, at the end of twelve years the *Havana* and *Saratoga* would be worth $1,200,000. Yet the Board on which Mr. Gilmor sat valued them at $2,240,000!

There were three civilians on the Board—Stevenson Taylor, Daniel Bacon and A. L. Swasey. Mr. Taylor was President of the American Bureau of Shipping (Record, p. 84, fol. 636). Mr. Bacon is a shipowner and operator of many years' experience (Record, p. 84, fols. 636-7),

Mr. Swasey is a naval architect and Vice-President of the Herreshoff Manufacturing Company (Record, p. 107, fol. 682). It is significant that neither Mr. Taylor nor Mr. Bacon, men of the widest experience in merchant vessels, was called as a witness.

Mr. Swasey, naval architect, was with the Newport News Shipbuilding Company [illegible] five or six months; with Cramps for a year; and with the New York Shipbuilding Company for four years; he then joined the Herreshoff Company, which has noth[illegible]g to do with merchant vessels, but builds yachts and torpedo boats. He was appointed in 1917 a member of the Joint Board (Record, p. 108, fol. 684). The Board was a[illegible] raising boats so that the Government "would have a general idea what the value ought to be—would have a check" (Record, p. 115, fol. 698).

"Q. So that if the Navy took over under requisition a boat and the Navy had to pay for it he (Assistant Secretary Roosevelt) would have a guide in this preliminary appraisal of yours, is that it? A. Yes, sir" (Record, p. 115, fol. 698).

Mr. Swasey was not an expert on the value of merchant vessels.

"Q. While you were no doubt a very valuable technical man on these Boards, you would not go so far as to say that you were a real expert on the market value of ships when you went on this Board on April 21, 1917? A. I would say that I was primarily chosen as expert on yachts and motor boats."

"Q. Were you an expert on the market value of yachts at that time or the cost of building them or the method of constructing them? A. No, the cost of building them and method of construction" (Record, p. 118, fol. 703).

The above summary confirms the conclusion of the Circuit Court of Appeals that the greater weight of persuasive testimony favors the proof offered in behalf of the *Proteus*. Certainly, Mr. Martin, the most experienced marine surveyor in New York, and Messrs. Smith and Raymond, presidents of two of the largest American steamship companies, are far more competent to pass on the value of an American steamer than any of the petitioner's witnesses.

2. THE CIRCUIT COURT OF APPEALS RIGHTLY HELD THAT THE HIGH COST OF REPRODUCTION WAS NOT ARTIFICIAL OR FICTITIOUS.

This Court has often held that evidence of cost of reproduction is to be considered in the ascertainment of value. *Southeastern Telephone Co.* v. *Public Service Commission* (262 U. S. 276, 287); *Bluefield Company* v. *Public Service Commission* (262 U. S. 679, 689); *Georgia Railway* v. *Railroad Commission* (262 U. S. 625, 629).

This is also the law of England.

> *In re Arbitration between the Mersey Docks and Harbor Board and the Lords Comissioners of the Admiralty,* 3 K. B. Div. (1920), p. 223.

In that case the Mersey Docks and Harbor Board contracted with certain shipbuilders to build a hopper barge. On February 8, 1917, when the barge was approaching completion the Admiralty requisitioned her in her unfinished state for Admiralty service. Later, in August, 1917, the Admiralty purchased the barge for the original contract price, to be paid by them to the shipbuilders. The evidence showed that if the barge had

not been requisitioned she would have been completed and delivered to the Board in April, 1917. On account of the war, it was impossible for the Board to replace the barge by another of the same kind in less than three years from April, 1917, or at a cost less than three times the original contract price. These proceedings were to determine the compensation which should be paid by the Admiralty to the Board. Reading, *C. J.*, said:

"In my judgment it is sufficient for the purposes of this case to say that the Board are entitled to have the property which, but for the action of the Admiralty, would have been in their possession in April, 1919, replaced by the Admiralty. As it cannot be replaced except by the expenditure of money, they are entitled to the amount of money which would represent the cost to them of the replacement" (p. 233).

The above case was cited with approval by this Court in *Brooks-Scanlon* v. *U. S.* (265 U. S. 106).

No better evidence of the cost of replacing the *Proteus* could be desired than the estimate of her builders. This evidence is found in the full and accurate testimony of Frederick B. Palen, vice-president of the Newport News Shipbuilding & Dry Dock Company, who had been with that company over twenty-five years. His company built the *Proteus*, and he calculated that in August, 1918, it would cost $1,750,000 to replace her. He explained in detail how he arrived at the figure.

"Well, the way we arrive at the cost is that I ask our estimating department at the Works to prepare an estimate on the actual cost of the labor and material, and that is usually done by a staff of estimators under the supervision of a head estimator, and the reason which you brought out about the estimate being then under different influences is explained by the way we make it, that the men who make this estimate and figure out the

weights of the ship and apply the factors of the cost to these weights do not know what the estimate is for, and their only object is to get the estimate which may be the basis of the estimate which they prepare as nearly accurate as they can get it, and that is their whole employment with us, and then they furnish to me these figures of the estimated labor and material in our plant and then I take these figures and apply to these the cost of our expenses in connection with the handling of the work and any independent conditions that may prevail in the market as to a rising or declining market and use our judgment on that and also the amount of profit I think that the circumstances or the market conditions justify.

"Q. You are testifying as to a course adopted by your organization? A. Yes.

"Q. What I am seeking to learn is what you actually did when you were called upon to give this estimate of the price of the *Proteus*. A. I actually asked our organization to supply me with the figures of the estimated cost of the labor and material in accordance with our usual custom and on these figures I based the selling price which I have given.

"Q. Did you specify that it was to be an exact reproduction of the *Proteus?* A. Yes" (Record, pp. 128-9, fols. 722-3.

* * * * * * *

"Q. What I am driving at is this: In your estimate on this reproduction did you actually figure the exact duplication of the *Proteus?* A. Yes, we figured an exact duplication and we took the exact weights of the ship as they were exactly and the estimates were based on ~~this~~ those.

"Q. And you took this as it was originally constructed or with any improvements? A. No, we took it as it was originally constructed" (Record, pp. 133-4, fol. 733).

The only criticism which counsel for the petitioner made of this estimate was the alleged high plus of 17½%, but Mr. Palen showed that in August, 1918, the prevailing rate was from 15% to 25% and that the rate he took was equivalent to 10% in 1900.

"A. The plus I used here was 17½% and it amounted to $261,450.

"The Commissioner: What was the plus in 1900 on the original boat?

"The Witness: The plus in 1900 was about 10%.

"The Commissioner: Was that the prevailing rate of plus in 1900?

"The Witness: Yes, at that time it was a very low market. In 1918 it varied all the way from 15 to 25%. We were charging usually 17½% after the market opened.

"The Commissioner: It made the same thing for you in 1918 that 10% made in 1900?

"The Witness: Yes" (Record, p. 127, fol. 719).

Petitioner's witnesses found the cost of reproduction by multiplying the original cost by two and one-half, a purely arbitrary figure. Of that method Mr. Palen testified as follows:

"Q. One of the witnesses here the other day said that in his opinion a fair way of getting at the cost of reproduction in August, 1918, would be to multiply the cost of a ship by 2½, the cost of a ship of this age being eighteen years, by 2½. What do you say as to the fairness of that? A. That is quite unreliable and that is not the way any shipbuilding people who have to determine the price they put in for a ship, arrive at the cost of a ship. If the factor of 2½ differs the slightest bit from the actual factor it should be, you get a very great error in your price. I can describe if you want how we make an estimate" (Record, p. 122, fol. 710).

The soundness of Mr. Palen's criticism may be tested by comparing his estimate with that of Cramp's Shipyard for replacing the *Havana* and *Saratoga*. Their figure was $3,000,000 for each vessel, which amounted to $468 per gross ton or $600 per deadweight ton or 3⅓ times their original cost. Mr. Palen's estimate of the cost of reproducing the *Proteus* amounted to $437 per deadweight ton,

or three times her original cost. The estimate of petitioner's witnesses are mere conjectures.

The Commissioner and the District Court discounted the cost of production as testified to by claimant's expert witnesses and by Mr. Palen, for the reason that they regarded the high prices of 1918 as artificial and fictitious. The Circuit Court of Appeals held that although these prices were brought about by unusual economic conditions, and may not have been expected to survive indefinitely, nevertheless there was nothing fictitious or artificial about them (Record, p. 229). This holding finds ample support in recently decided cases. In *Southeastern Telephone Co.* v. *Public Service Commission* (262 U. S. 276, 287-8), a rate making case, this Court said:

"Obviously the Commission undertook to value the property without according any weight to the greatly enhanced costs of material, labor, supplies, etc., over those prevailing in 1913, 1914 and 1916. As a matter of common knowledge these increases were large * * * It is impossible to ascertain what will amount to a fair return upon properties devoted to public service without giving consideration to the cost of labor, supplies, etc., at the time the investigation is made."

And in *Bluefield Company* v. *Public Service Commission* (*supra*) it was said:

"The record clearly shows that the Commission in arriving at its final figure did not accord proper, if any, weight to the greatly enhanced costs of construction in 1920 over those prevailing about 1915 and before the war as established by the uncontradicted evidence; and the Company's detailed estimated cost of reproduction new less depreciation at 1920 prices appears to have been wholly disregarded. This was erroneous.' p 689

The period of high values was not brief and momentary. It began before we entered the war. Even before

1917 vessels were selling at $300 per ton and the high values continued "up to the first of the year" (1920, the "peak" being about the end of the war (Martin, Record, p. 33, fol. 540).

This is confirmed by petitioner's witness Morrell:

"Q. After the Armistice prices remained very high for the construction of vessels? A. Yes.

"Q. And continued to be high until the latter part of 1919? A. Yes" (Record, p. 77, fols. 623-4).

In *Consolidated Gas Company of New York* vs. *Newton*, 267 Fed. 231, Learned Hand, *J.*, in discussing the high prices of labor and materials during and after the war said:

"Several reasons lead me to believe that present price levels are not merely transitory, though I recognize the danger of any prophecy. Whatever their precise cause, it is universally conceded to be due to the Great War, and by that I mean, of course, not to the prosecution of hostilities but to the economic exhaustion and inflation of the circulating medium which these involved" (p. 234).

"The period, despite its unusual character, I find to be a sufficient basis for the calculation of the cost of reproduction and the rate base for a future time long enough to call for some judicial action" (p. 236).

In *New York Telephone Company* v. *Prendergast* (300 Fed. 823), the C. C. A., 2nd Cir., referring to inflated values, said:

"The goal of investigation is present value, and, since all value rests on the appreciation or estimate of users of the thing valued, all value is a matter of opinion, and a good opinion is only ripened experience. Again, value for practically every legal purpose can be expressed only in terms of money, and present value can only be stated in terms of present money. It makes no difference that

some regard prices as inflated, and others think dollars deflated; we have no other way of expressing present prices or values except in present money" (p. 825).

In *The Kia Ora*, 252 Fed. Rep. 507, the Circuit Court of Appeals for the 4th Circuit, in valuing a vessel in 1917, took into consideration the high prices existing during the war. A vessel built at a cost of $700,000 was valued at $1,772,620, or about 2½ times the original cost.

Another illuminating instance is that of the steamers *Havana* and *Saratoga*. These vessels were built in 1906, at a cost of $900,000 each. They were taken over by the Government during the war and a board appointed by the Navy Department consisting of Naval officers, Naval constructors and engineers appraised the vessels and paid the owner, the New York and Cuba Mail Steamship Company, $2,240,000 for each vessel (Smith, Record, p. 37, fol. 551). This is equivalent to $350 per gross ton or $448 per deadweight ton.

In *Laird Line* v. *Clan Line* (1924), 19 Lloyd's List L. R. 394, the question involved was the value of the steamship *Rowan*, which was sunk by collision with the steamship *Clan Malcolm*, Lord Constable in commenting upon the appreciation of vessel property during and after the war said:

"It is common knowledge that the value of shipping greatly appreciated during the war, that the appreciation continued for a considerable time thereafter, and that it was succeeded by a heavy depreciation. The chief slump occurred in 1920. An instructive chart was produced by Mr. Bateman, of Messrs. Kellock & Co., shipbrokers, London, showing the variation in values from 1898 to 1924. It related to a 7500-ton cargo steamer of ordinary type, and showed that the value of such a

steamer (new) was in 1909 £36,000; that in 1920 it rose to £259,000, and that in October, 1921, it fell to £60,000.

"It was also proved that the cost of construction of new vessels did not vary in the same way as market values; but fell much more slowly. It was admitted that, at the date of the collision, it would have cost £118,000 to build a vessel of the same construction as the *Rowan*, though she cost only £41,665 to build in 1909" (p. 395).

The respondents are entitled to be compensated on the basis of the prices current at the time the *Proteus* was lost as in the case of the *Mersey Docks & Harbor Board, supra,* where Reading, *C. J.*, said the cost of reproduction

"must be measured with regard to the special circumstances arising from the war, and more especially to the increase in the value of labor and materials" (p. 223).

3. A RATE OF DEPRECIATION OF 2½% WAS FAIR AND REASONABLE AS APPLIED TO THE PROTEUS.

Judge Manton was clearly right in saying that "there is no fixed rule as to the amount of depreciation". He pointed out that "the rule has varied between three and five per cent. for depreciation in tax matters", and that the reason two and a half per cent. was used by the experts in the case at bar was because of the unusual high standard of upkeep of the *Proteus* (Record, p. 230).

Mr. Smith of the New York and Cuba Mail Steamship Co. (Ward Line) testified:

"That is a very difficult subject, one that has been discussed of late a great deal by shipowners, what is a fair depreciation. I can say to you very frankly there are ships I would charge 10 per cent. off for depreciation on, and there are others that two per cent. is quite ample. It depends on the care that the owner takes of his vessel. There are many owners that go on the theory that an ounce of prevention is better than a pound of cure, and

they keep their vessels in such a state of efficiency that when the periodical survey comes there is practically nothing to do to them. There are others who run them for all they are worth to get all that they can out of the ships, and when the periodical survey comes spend a quarter or a half of what the vessel originally cost to practically restore her. The policy of the Southern Pacific has been similar to ours. They are very jealous with their fleet. They have ample means and they keep their vessels way up to the top notch. That is their reputation.

"Q. Is that their reputation or do you know that from observation? A. From observation, yes. I cannot answer of course as to every single reverse bar, and that every tank top is in condition" (Record, pp. 40-1, fols. 554-5).

Mr. Martin testified that in normal times the depreciation used was as high as 5% (Martin, Record, p. 30, fol. 534) but in valuing the *Proteus* he used 2½%, which he regarded as conservative.

"The Commissioner: Taking these sales that you know about and that you have taken into consideration, with the amounts for which the sales were made, about what would it have cost to build a new vessel at that time less two and one-half per cent. per year for depreciation?

The Witness: It is even less than two and one-half per cent. For instance, you take the vessel I spoke of, that vessel could have been built at the time she was sold for about $175 a ton, and yet she sold for $170.

The Commissioner: And really you are being conservative?

The Witnesss: Yes, very conservative" (Martin, Record, p. 34, fols. 541-2).

Mr. Raymond used 5% and gave the claimant a credit of 50% for keeping his vessels up better than others, which substantially amounted to a depreciation of 2½% (Raymond, Record, p. 63, fols. 597-8).

The rates used by the petitioner's witness Morrell—4% for 14 years and 2½% for 4 years—were based, he says, on the testimony in this case:

"Part of it is based on the testimony in this case. Mr. Martin, for instance, has taken five per cent. Mr. Raymond has taken three and one-half to four and one-half per cent" (Morrell, Record, p. 80, fol. 627).

But both Martin and Raymond used 2½% (fols. 537 and 598).

Mr. Swasey and Mr. Gilmor used the Stevenson Taylor table of depreciation, which depreciates an 18 year old vessel to about .452 of her cost. This was the same table which, Mr. Gilmor testified, was used by the Board of Appraisal for Merchant and Private Vessels, of which he was a member. Although he endeavored to reconcile his valuation of the *Proteus* arrived at by using a rate of depreciation of about 5%, with the valuation placed upon the *Havana* and *Saratoga* by this Board, he failed to do so. The estimated cost of reproducing the *Havana* and *Saratoga* was $3,000,000 (Smith, Record, p. 39, fols. 551-2). If we apply the high rate of depreciation urged by the petitioner, 5%, at the end of 12 years the *Havana* and *Saratoga* would be worth $1,200,000. Yet the Board on which Mr. Gilmor sat, valued them at $2,240,000. It is clear that in valuing the *Havana* and *Saratoga* the Board must have used a rate of depreciation of about 2% for twelve years.

Not only the respondents', but also the petitioner's witnesses testified that the *Proteus* was unusually well kept up. Petitioner's witnesses, however, failed to give credit for this factor and applied the Stevenson-Taylor

table arbitrarily. This accounts for the great difference in the valuations of the respondents' and the petitioner's witnesses. The Stevenson-Taylor Depreciation Table should not be arbitrarily applied, for it completely ignores the upkeep of vessels and applies the same rule to tramps and to vessels like the *Proteus*, which was not an average, but an exceptional, vessel.

Mack, *C. J.*, found that the *Proteus* "like the other vessels of the claimant, was excellently maintained * * *". And he was of opinion "that the Stevenson-Taylor depreciation table is not to be arbitrarily applied in a case of this kind and that consideration is to be given to the actual upkeep of the vessel in question in determining the percentage of depreciation" (Opinion, Record, pp. 195-6, fol. 861).

It is true that cases involving taxes can be found where a rate of depreciation as high as 5% has been held fair, but it is to be noted that in none of those cases is there the important element of high standard of upkeep. There are also cases where 3% has been held to be a fair rate of depreciation. See the decision of the Committee on Appeals and Review of the Treasury Department, Accumulative Bulletin No. 2, January-June, 1920, page 139, in which case the representatives of various steamship companies appealed from a decision of the Income Tax Unit fixing 2% as the rate of depreciation allowable on their steamships. The Committee held upon the facts that 3% was the proper allowance.

It is pointed out (Petitioner's brief, p. 81) that the Southern Pacific Co. depreciated the *Proteus* on its books three and three-fourths per cent. per annum. This is of

little evidential value. In *New York Telephone Co.* v. *Prendergast* (*supra*) the Court said:

"In fact, the depreciation reserve is a piece of book-keeping, a monthly charge against earnings, to provide means, not only of covering deterioration from use and time, but of minimizing, and only minimizing, future possible losses of any kind, from storm or fire to changes of fashion.

* * * * * *

"To deduct from the fair value of plaintiff's property the entire book reserve for depreciation, in order to reach a rate base, was error of law. In point of fact the property had not depreciated that much; the commission did not find any such depreciation. It did hold that plaintiff was estopped by the figures of the book reserve; it was 'bound by its own contention', because 'these depreciation reserves represent the company's own best estimate of the extent to which their own property has aged.'

"This is merely untrue; the book charges represent what observation and experience suggested as likely to happen, with some margin over. The legal error is in not recognizing that the law requires deduction only for actual depreciation, just as actual as the present value, and the extent of that depreciation must be ascertained by the same kind of evidence; in the last analysis, opinion based on contemporary investigation. The rule enforced by the commission would cause some alarm, if a catastrophe of nature instantly produced a deterioration of 50 per cent. when the book reserve was but half that amount; yet a real estoppel must always be mutual, and it is a poor rule that does not work both ways" (pp. 824, 5-6).

As the *Proteus* was unusually well kept up, she should be given credit, in determining a proper rate of depreciation. Petitioner's witnesses ignored this factor and used 5%, and it may be well said of them, rather than of the Circuit Court of Appeals, that due consideration was not given to this subject in its application to the valuation

of the *Proteus* (Petitioner's brief, p. 81). The following statement is found in petitioner's brief, page 81:

"There was some testimony to the effect that the *Proteus* had been well-maintained; but, such testimony was in the nature of 'hearsay', as those who testified had not recently been on board that vessel. It is also to be remembered that she had been in war service for a considerable time, and there is not any evidence whatever that the *Proteus* had undergone reconditioning or repairing during that period at least."

This is quite inaccurate. Amos S. Hebble, the Superintending Engineer of the Southern Pacific Company, testified as follows:

"Q. But the upkeep year by year, who took care of that? A. That is taken care of generally by the Southern Pacific Company's own shops.

Q. Where are their own shops? A. At Piers 49 and 50 North River.

"Q. And where was she docked? A. She was docked at Tietjen & Lang's, Hoboken, and the Robins Dry Dock Company.

Q. Who supervised those repairs? A. I did.

"Q. And upkeep? A. I did.

"Q. What do you say as to the character of the upkeep of their boats, or of this boat? A. The '*Proteus*' was maintained to a very high standard as is the general practice of the Southern Pacific Company.

"Q. Can you speak of it comparatively, in comparison with others? A. The standard of maintenance of the '*Proteus*' is very much higher than most other companies operating out of this port and as good as any" (Hebble, Record, pp. 46-7, fols. 566-7).

And Frank S. Martin testified:

"Q. Do you know the steamship *Proteus* of the Southern Pacific? A. I do.

"Q. How long have you known her? A. Almost from the time she was built.

"Q. When was that? A. In 1900, in May.

"Q. She was built where? A. At the Newport News Shipbuilding Company, Newport News, Virginia.

"Q. Give her dimensions for the sake of convenience? A. She was 405 feet over all, 390 feet between perpendiculars, 48 feet beam, 32 feet 9 inches depth, 3,006 net tons, and 4,836 gross tons registered.

"Q. Do you happen to know her dead weight? A. Dead weight about 4,000 tons.

"Q. She was a single screw? A. Yes, a single screw.

"Q. Steel? A. Steel triple expansion engines, and Scotch boilers.

"Q. How lately had you seen her before she was lost in the month of August, 1918? A. A few months before.

"Q. For what purpose, what occasion? A. I made a great many surveys of Southern Pacific vessels from time to time.

* * * * * *

"Q. Are you able to say whether the *Proteus* had been kept up and what her condition was a few months prior to her loss? A. I would say the *Proteus* is as well kept up as any vessel they had, and the vessels of the Southern Pacific were all kept up well. I examined the *Comus* last summer in regard to her condition and she was well kept up" (Martin, Record, p. 28, fols. 530-1).

This testimony was corroborated by Mr. Smith (Record, p. 40).

We submit that in view of this undisputed evidence to the effect that the *Proteus* was unusually well kept up, a rate of depreciation of 2½% was fair and reasonable.

4. Original Cost, Book Value, and Insured Value.

The petitioner argues that evidence regarding the original cost of the *Proteus,* her book value, and her insured value was disregarded by the Circuit Court of Appeals. Evidence of the original cost and of the book value of the *Proteus* was produced by the respondents themselves. As to insurance value, it was well under-

stood that the *Proteus* was insured against marin perils and it was a fair presumption from the evidence that she was insured on the same terms and in the same amount as her sister ship, the *Comus* (Record, fols. 792, 794, 795, 796 and 798). All these facts were before the Court, for what little they were worth, and it is pure assumption on the part of the petitioner's counsel to say that they were disregarded.

Original cost is valuable only insofar as conditions at the time of construction were the same as at the time of fixing the value. The value of property may be far greater than its cost. *Brooks-Scanlon* v. *United States, supra* (p. 863).

In *Mobile Gas Co.* v. *Patterson* (293 Fed. 208) the court in commenting upon the weight to be given to original cost said:

"The present reasonable market value is the test which is ordinarily adopted; but where there is no established reasonable market value for any reason, the court must resort to such other methods of arriving at a just conclusion as may be available; and in determining this question much, little, or no light may be obtained from an inquiry as to what the owner actually paid for the property, according to circumstances. If the purchase has been recent and made in the ordinary course of dealings, it may serve to throw doubt upon the insistence of the plaintiff that the reasonable value of the property was much greater than the purchase price, or upon the insistence of the defendant that it is much less; but if the purchase was made at a remote period when the conditions were greatly different from those prevailing at the time of the inquiry, the original cost of the property is of little or no evidential value" (p. 214).

In like manner book value bears little or no relation to actual value. It is simply a matter of bookkeeping, by which the value of the vessel is written off from year

to year in order to create a reserve for future contingencies.

The amount of insurance placed on a vessel is *res inter alias acta* and is not evidence of her actual value.

Petitioner's witness, Walker, who testified that the *Comus* was insured for $690,000, when asked on cross-examination if he thought that amount represented the value of the *Comus* in 1918, answered in the negative (Record, p. 173, fol. 810). On further cross-examination he said he thought the value of $690,000 was too low.

"Q. When you said a moment ago that you did not think the value of $690,000 approximately represented the true value may I ask you whether you think it is too low or too high? A. *I should think it was low*" (Record, p. 174, fol. 813).

In *Union Pacific Railroad Co.* v. *Lucas,* 136 Fed. 374, the court said of this species of evidence:

"The theory and practice of insurers and insured is to make the limit of insurance much less than the value of the property, while owners are permitted to procure insurance in amounts far below this limit. The result is that the amount of insurance has no fixed or uniform relation to the value of the property it covers, and hence does not directly tend to disclose its value."

The same rule was adopted in *In re Commissioners to appraise Washington Market Co.* property, 295 Fed. 950. The Court of Appeals, District of Columbia, there said:

"The amount of insurance which an owner places upon a given piece of property is little or no index of its value. One may feel impelled to carry a much larger percentage of risk than another" (p. 954).

The petitioner is naturally dissatisfied with a decision which largely increases its liability. The Commissioner

frankly stated on the excellent authority of Judge Addison Brown that in his finding he approached the question as a jury would after hearing all the facts and circumstances. The same thing is true of Judge Mack. The judges of the Circuit Court of Appeals weighed the evidence, considered all the facts and came to a different conclusion from the Commissioner and Judge Mack.

Now, having reached this Court on *certiorari,* the petitioner asks this Court to pass once more on this question of fact. We respectfully submit that this Court should refuse to retry a question of fact.

Résumé of Evidence of Value

A. Respondents' Witnesses.

		Per Gross Ton	Per Dead Weight Ton
Martin	$1,225,000	$253.00	$318.00
Raymond	1,297,000	267.00	337.00
Smith	1,350,000	279.00	350.00

B. Petitioner's Witnesses.

		Per Gross Ton	Per Dead Weight Ton
Morrell	$630,000.	$130.00	$163.00
Gilmor	650,000.	134.00	169.00
Swasey	611,000.	127.00	158.00
Walker	Higher than 690,000.		

C. Valuations of other vessels:

Vessel	Original Cost	Valuation	Per Gross Ton	Per Dead Weight Ton
Saratoga	$900,000	$2,224,000	$350.00	$448.00
Havana	900,000	2,224,000	350.00	448.00

See *Kia Ora,* 252 Fed. Rep. 507.

Original Cost	Valuation as of 1917	Per Gross Ton
$700,000	$1,772,600	$270

Valuations of the three above vessels amount to two and one-half times their original cost.

IV. THE DECISION OF THE CIRCUIT COURT OF APPEALS SHOULD BE AFFIRMED.

January, 1925.

CHARLES C. BURLINGHAM,
VAN VECHTEN VEEDER,
A. HOWARD NEELY,
Counsel for Respondents.

OCT 13 1923

Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 197

STANDARD OIL COMPANY OF NEW JERSEY,
Petitioner,

—against—

THE SOUTHERN PACIFIC COMPANY and JAMES C. DAVIS, Director-General of Railroads,
Respondents.

BRIEF FOR CARGO CLAIMANTS, RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

BIGHAM, ENGLAR & JONES,
Proctors for Cargo Claimants, Respondents.

D. ROGER ENGLAR,
E. CARMODY JONES,
Of Counsel.

Supreme Court,

OF THE UNITED STATES,

OCTOBER TERM—1923.

No. 607.

STANDARD OIL COMPANY OF NEW JERSEY,
Petitioner,

—against—

THE SOUTHERN PACIFIC COMPANY, and JAMES C. DAVIS, Director General of Railroads,
Respondents.

BRIEF FOR CARGO CLAIMANTS RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

This brief is filed on behalf of cargo claimants.

Their claims, aggregating, with interest, nearly a half a million dollars, have been allowed both by the District Court and by the Circuit Court of Appeals, and the petitioner no longer contests the right of these claimants to recover the sums awarded to them by the decree of the District Court. In addition to these claims there are numerous claims of passengers and of the crew of the *Proteus* for loss of personal effects, as well as two claims for personal injury.

The causes of action for the claims mentioned arose out of the sinking of the steamship *Proteus*

on August 19th, 1918, more than five years ago. This litigation has been in the Courts for more than four years. If this Court should grant the prayer of the petition, a further long delay would intervene before the claimants, mentioned above, would receive payment of their claims, which are no longer disputed. We feel that it is not inappropriate that, on behalf of such claimants, we submit reasons for the denial of the petition.

The petitioner apparently has so little confidence in the First Point of its brief, that it has appended a second point. In the Second Point it relies on allegations of the petition (pp. 5, 6, 7 and 8) which set up facts not to be found in the record. The petition alleges that, since the expiration of the term of the Circuit Court of Appeals, at which the decision was handed down in this case, it has come to the attention of the petitioner's counsel that a final settlement has been arrived at between the Railroad Administration and the Southern Pacific Railroad Company, by which the liability of the Railroad Administration for the loss of the *Proteus* has been finally satisfied and extinguished by payment, credit or adjustment of the value of the *Proteus*. It is not alleged, however, that diligence on the part of the petitioner or his counsel would not have disclosed these facts. Nor could such an allegation be made, because it appears from the answer filed to the petition, praying for limitation of liability, by the Southern Pacific Company, that this answer was filed on behalf of the Southern Pacific Company, as owner of the steamship *Proteus*, and Walker D. Hines, as Director General of Railroads jointly, and from the petition which

was filed by the Southern Pacific Company to limit its liability, that the Southern Pacific Company alleges that it was the owner of the *Proteus;* that the *Proteus* had been taken over by the President of the United States, pursuant to an Act of Congress of August 29th, 1916; and that the President took possession of the said ship on December 28th, 1917, pursuant to a proclamation made by him on December 29th, 1917. It is also alleged that the *Proteus*, at the time of her loss, was in the possession and control of, and was operated by William G. McAdoo, as Director General of Railroads, who manned, victualed and navigated the vessel at his own expense.

The Admiralty Rules promulgated by this Court (Admiralty Rule XXXI), gave the petitioner the widest latitude in addressing interrogatories to the Southern Pacific Company and to the Director General of Railroads, but the petitioner did not avail itself of this privilege. It awaited the decree of the District Court and of the Circuit Court of Appeals before seeking to make any inquiries. This delay is all the more difficult to understand when reference is made to the last paragraph of Judge Mack's opinion. Judge Mack says:

> "The claimant and Director General, I assume have come, or will come, to an agreement regarding their respective rights as to the interest accruing during the period of requisition. Unless some agreement has been reached I assume that the Government is entitled to the interest during the period of requisition and the claimant to its agreed compensation" (Record, p. 862).

Whatever may have been in the petitioner's mind before Judge Mack's opinion was filed, it cannot be said, after it was delivered, that the petitioner was ignorant of the fact that the Southern Pacific Company and the Director General had some differences to compose. It should be borne in mind also that this opinion was delivered before the entry of the final decree in the District Court.

Under such circumstances, it is respectfully submitted that the petitioner is not in a position to ask relief from this Court which, if it had been diligent, it could have obtained from either of the Courts below. And when, to grant the petition, the payment of claims which are no longer disputed would be postponed for more than a year, it is respectfully submitted that such a hardship should not be imposed on such claimants. No sufficient reasons appear in the petition to sustain the petitioner's application. In fact it sets up the want of diligence of the petitioner as a ground for the issuance by this Court of the extraordinary writ of certiorari.

It is respectfully submitted that the application for a writ of certiorari should be denied.

BIGHAM, ENGLAR & JONES,
Proctors for Cargo Claimants-Respondents.

D. ROGER ENGLAR,
T. CATESBY JONES,
Of Counsel.